BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	12-10-71
Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)	)))	Docket No. 50-247

APPLICANT'S BRIEF IN OPPOSITION TO THE CITIZENS COMMITTEE FOR THE PROTECTION OF THE ENVIRONMENT'S REQUEST THAT OFFICIAL NOTICE BE TAKEN OF CERTAIN DOCUMENTS

I

The Citizens Committee for the Protection of the Environment ("CCPE") has requested the Atomic Safety and Licensing Board ("the Board") in this proceeding to take official notice of certain portions of the documents which are listed in Appendices A-C to its brief dated November 24, 1971. CCPE, however, has not made any attempt to identify the specific portions of these documents which it wishes officially noticed, but states that it will do so in its proposed findings of fact and conclusions of law which are due to be filed next month. It also reserves the right to add additional documents to the list at that time. This brief in opposition to CCPE's request is submitted by the Applicant in response to the Board's request (Tr. 3843).

The Applicant strongly objects to the failure of CCPE to have identified in its brief of November 24, 1971 all the documents or portions of documents of which it requests that official notice be taken. Such an identification should have been made not later

hearing

than October 25, 1971. Applicant reserves the right to supplement this brief after it has had a reasonable opportunity to review the specific portions of the documents cited by CCPE.

In the event of CCPE's failure to identify forthwith the specific portions of these documents it desires officially noticed, Applicant requests the Board to deny CCPE's request in its entirety. CCPE's request for official notice cannot in Applicant's view effectively be dealt with in the abstract but rather depends, in each individual instance, upon the particular facts to be noticed. This point is particularly compelling because of the sweeping character of CCPE's request. Following the procedure proposed by CCPE would have the effect of materially delaying the conclusion of the radiological safety portion of this proceeding and would be entirely inconsistent with the notion of CCPE expeditiously completing the balance of its case. The documents in question constitute a major portion of CCPE's case and the identity of the specific material it desires to be officially noticed cannot properly be held back until the time of submission of its proposed findings and conclusions.

The same principle requires that CCPE be precluded from seeking that official notice be taken of as yet unspecified documents. CCPE has had an adequate opportunity to present its case and should not be permitted at this time to supplement its evidentiary presentation by offering new documents in evidence.

II

Should the Board wish to pass upon CCPE's request solely on the basis of the information presently available, it should refuse to take official notice of any portion of the documents listed in Appendices A-C to CCPE's brief.

CCPE attempts to categorize into two classes the information it desires to have noticed. Class 1 data, it says, consist of "test results, mathematical calculations and other similar non-opinion data." The Board is asked to officially notice such data and accept them as true and correct on the basis that, since the documents in which they appear were prepared by AEC contractors and delivered to the Commission, each item of data constitutes a "technical or scientific fact within the knowledge of the Commission as an expert body" under 10 CFR Section 2.743(i). In making such a request, CCPE seems to be taking the position that every fact of a technical or scientific character, no matter how obscure or controversial, contained in any document prepared for the Commission and in its possession automatically constitutes a fact within the Commission's knowledge and is, therefore, of such a proven and accepted nature that it may be officially noticed and need not be sponsored by a competent witness available for cross-examination. That such a meaning was never intended by the Commission to be given to §2.743(i) of its Rules of Practice is abundantly clear from the following

explanation of the purpose and effect of that rule as contained in paragraph III.(f) of Appendix A to 10 CFR, Part 2:

> "(f) Official Notice. (1) 'Official Notice' is a legal term of art. Generally speaking, a decision by a board must be made on the basis of evidence which is in the record of the proceeding. A board, however, is expected to use its expert knowledge and experience in evaluating and drawing conclusions from the evidence that is in the record. The board may also take account of and rely on certain facts which do not have to be 'proved' since they are 'officially noticed'; these facts do not have to be 'proved' since they are matters of common knowledge. (2) ... (For example, a board might take 'official notice' of the fact that high level wastes are encountered mainly as liquid residue from fuel reprocessing plants.) ..." (Emphasis supplied.)

It is obvious from the foregoing that the official notice technique was never intended to apply to detailed and little known facts of the type contained in the illustration on page 1 of CCPE's brief, but rather only to fundamental, relatively non-controversial facts of common knowledge such as that set forth in the example in Appendix A to Part 2.[1/]

1/Counsel for CCPE is in error when he states on page 2 of his brief that there is apparently no dispute that "test reports and similar Class 1 data which are developed under contract with AEC and are reported to the AEC in documents similar to those contained in Appendix A" to CCPE's brief are within the knowledge of the Commission. On transcript page 3856 counsel for the Applicant indicated that the fact that the Idaho Nuclear Corporation Semi-Scale tests have been performed is a matter of common knowledge and might be a proper subject for official notice under §2.743(i). Quite the contrary, however, is true of detailed facts and statements contained in the reports on those tests.

Counsel for CCPE mistakenly contends on page 3 of his brief that the AEC's regulation, in effect, treats official notice as a standard for admissibility of evidence. In fact, official notice is rather a technique for accepting and relying upon the truth and correctness of evidence, once admitted, without providing the customary safeguard of a sponsoring witness available for cross-examination. It is, moreover, a device by which one who seeks to prove a fact is completely relieved of any obligation to establish its truth and correctness, with the burden of disproving the same being shifted to the opposing party. Certainly, such a technique is appropriate only in an instance of widely accepted facts of common knowledge and has no applicability to a collection of detailed material such as CCPE proposes to have officially noticed in this proceeding. To hold otherwise, would be to relieve CCPE of the obligation of going forward with its own case and would shift to the Applicant what could prove to be a truly enormous burden of disproving by rebuttal each and every one of a mass of questionable facts and opinions.

Class 2 of the data which CCPE seeks to have officially noticed by the Board in this proceeding consists of opinions expressed in the documents listed in Appendices A-C to CCPE's brief. The purpose of taking official notice of these opinions, according to CCPE, is not to establish the truth of those opinions

but merely to establish the simple fact that such opinions exist.[2/] In making this distinction, CCPE appears to recognize that 10 CFR Section 2.743(i) provides only for the official noticing of the truth of "facts" and not of opinions. It is perfectly clear from CCPE's counsel's own statements concerning the use which he desires be made of these opinions after official notice is taken (Tr. 3842-3; CCPE brief p. 5), however, that he wants the Board to do considerably more than just recognize their existence. To do just that, of course, would be pointless. Instead the Board is asked to accept these opinions as "competent expert opinion" and to conclude therefrom that serious doubts exist as to the safety of the Indian Point Unit No. 2 plant.

Surely, the Board cannot reach these conclusions without passing judgment upon the competence of the authors of the opinions and without ascribing to those opinions at least some degree of truth. This being the case, official notice is a

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2/CCPE states on page 5 of its brief that the mere existence of "competent expert opinion" contrary to the safety of the Indian Point 2 plant "demonstrates a significant margin of doubt which prohibits Applicant from obtaining an operating license for this plant." Apart from the fact that CCPE makes no showing that the opinions in question apply to the Indian Point 2 plant, this statement reveals a complete misunderstanding of the role of the Board in this proceeding. It is this Board which must make the ultimate safety determination for the Indian Point 2 plant, based upon its own judgment of the weight of the evidence. What other persons allegedly think about the safety of the plant is not determinative.

wholly inappropriate technique for introduction of these opinions into evidence in this proceeding. If any truth is to be attributed to these opinions, there must be a proper foundation laid for them and competent sponsoring witnesses made available for cross-examination. To do otherwise would be highly prejudicial to the rights of the Applicant and amount to a denial of due process of law.

III

CCPE points out that §2.743(i) of the Commission's Rules of Practice provides that the opposing party shall be given an opportunity to controvert any fact which is officially noticed in an AEC proceeding. To the same effect is §7(d) of the Administrative Procedure Act. 5 U.S.C. §556(e). CCPE contends that this right of rebuttal adequately protects the interests of the Applicant herein and that, therefore, the right of cross-examination may be dispensed with. In making this assertion CCPE fails to recognize the fundamental purpose of the official notice rule, which is to dispense with the customary safeguards of proving through a competent witness relatively noncontroversial facts of common knowledge.[3/] See Ohio Bell Telephone Co. v. Public

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3/ Counsel for CCPE, on page 3 of his brief, has attempted to strengthen the force of his own arguments by misstating Applicant's position concerning official notice in the following respects: (1) He states that Applicant's objection to official notice being taken is "apparently based solely upon the inability to cross-exam." As is clear not only from this brief, but also from counsel for Applicant's statements at the hearing (Tr.3853-4),

Utilities Commission of Ohio, 301 U.S. 292 at p. 301 (1937) and Cook v. Celebrezze, (D.C., W.D.Mo., 1963) 217 F. Supp. 366. It is, in other words, a means of avoiding the necessity for proving facts under circumstances where the truth of such facts is so widely recognized that the proof of same is, for all practical purposes, unnecessary. The official notice technique was never intended to be put to the use proposed by CCPE here - that is, the wholesale acceptance by an adjudicatory body of a large number of sometimes controversial facts and opinions which, in total, constitute a substantial measure of CCPE's entire case. Under such circumstances, an opportunity to rebut would fall far short of the safeguards afforded Applicant by the

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3/(cont'd.) Applicant's objection runs not only to the inability to cross-examine, but also relates to the matter of reliability of evidence and to what we believe is the misuse of a legal doctrine which was designed for use only under very limited and special circumstances. (2) He also states that Applicant argues that the facts should be "indisputable" before official notice is taken of them. In fact, Applicant's position is that official notice is a device intended to permit the Board to rely on "relatively non-controversial" facts without requiring their formal introduction into evidence. Tr. 3853. (3) Counsel for CCPE further states that it is Applicant's contention that, once official notice is taken of a fact, the Applicant is denied the opportunity to controvert it. Applicant does not deny that it has the right to controvert officially noticed facts; what our contention is, however, that an opportunity to controvert is not the equivalent of a right to cross-examine and that to require Applicant to controvert a large body of controversial facts and opinion by means of rebuttal would be to place an unreasonable burden upon the Applicant.

fundamental rule that evidence must be sponsored by a competent witness who is available for cross-examination.

For example, counsel for CCPE contends that there are statements in these documents which support the view that Indian Point Unit No. 2 is unsafe. In fact, however, if the authors of these documents were called as witnesses they might well state that their general assertions do not apply to the specific case of Indian Point No. 2. Some of these statements may involve different technical viewpoints from those of the Applicant's witnesses, or there may be simple explanations or reconciliations that would emerge if a competent sponsoring witness were available for cross-examination.

All of these things would be much more difficult, if not impossible, to accomplish by way of rebuttal. It is for this reason that it is well established that where the facts in question are (1) before an administrative body in an adjudicative rather than legislative proceeding; (2) in dispute; and (3) critical to the basic issues of the case, nothing less than submission through evidence subject to cross-examination will sufficiently protect the interests of the opposing party. II Davis Administrative Law Treatise (1958) page 403.

> "The basic principle is that parties should have opportunity to meet in the appropriate fashion all materials that influence decision. Nothing short of opportunity for cross-examination and presentation of rebuttal evidence is appropriate for disputed adjudicative facts at the center of the controversy." (II Davis, supra, pages 403-404)

See also Glendenning v. Ribicoff (D.C., W.D.Mo., 1962) 213 F. Supp. 301. It is submitted that the facts in question here clearly meet the foregoing tests and that, accordingly, official notice is not a proper technique for bringing these facts to the attention of this Board.

IV

Counsel for CCPE also suggests in his brief (pages 5 and 6) that the documents which he lists in Appendix A are admissible in this proceeding on the ground that they constitute "business records." Counsel, however, has said that he is not formally making a request to admit these documents into evidence (see footnote 3 on page 6 of CCPE's brief). Accordingly, Applicant asks that the Board disregard everything in CCPE's brief dealing with the business records exception. Should counsel for CCPE have made such a request, however, it should be denied for lack of proper foundation. CCPE has made no showing that the documents in question were prepared in the ordinary course of business, as required by the business records "exception".[4/] Some of them are, in fact, nothing more than magazine articles. Furthermore, a fundamental principle of the business records exception is the fact that the documents to which it applies, by the nature of their contents and the method of their preparation,

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4/28 U.S.C. §1732 (Federal Business Records Act).

possess such an unusual degree of trustworthliness and reliability that the customary safeguard of producing the author as a sponsoring witness may safely be dispensed with.[5/] The contents of the reports here under consideration fails to possess that element of unusual reliability to justify dispensing with competent sponsoring witnesses who would be available for cross-examination. Indeed, many of these documents contain a "legal notice" in which the Commission, on behalf of itself and its contractors, expressly disclaims making any warranty or representation, express or implied, with respect to the accuracy, completeness or usefulness of the information contained therein.

V

In addition to the data discussed above, CCPE also requests the Board to take official notice (1) of unspecified

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5/"The exception [to the hearsay rule] which admits regular entries in the books of a business is justified by the following reasons: First, the element of unusual reliability is furnished by the fact that in practice regular business records have a comparatively high degree of accuracy (as compared to other memoranda) because such books are customarily checked as to correctness by systematic balance-striking, because the very regularity and continuity of such records is calculated to train the record-keeper in habits of precision, and because in actual experience the entire business of the country constantly functions in reliance upon such entires...." McCormick, Evidence (1954) p. 596.

portions of the transcript of the October 15, 1971 hearings in the Vermont Yankee case (Docket No. 50-271) (Appendix B to CCPE's brief) and (2) of certain "Class 1" data contained in several documents prepared by Westinghouse Electric Corporation which are listed in Appendix C to CCPE's brief.

The Applicant objects to official notice being taken of all or any part of these additional documents for the reasons already stated.[6/]

Moreover, insofar as the Vermont Yankee transcript is concerned, documents concerning something that may happen in Vermont are neither relevant nor material to the issues in this proceeding. The question here is the adequacy of emergency planning for Indian Point Unit No. 2. Furthermore, the doctrine of official notice extends to the contents of the records in other proceedings only in cases where, unlike here, there is a substantial identity of parties in the two proceedings. Of particular relevance here is Dayco Corporation v. F.T.C., 362 F.2d. 180 (6th Cir., 1966) where the Court set aside a decision of the Federal Trade Commission which had found the petitioner in

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6/Applicant has no objection, however, to the admission into evidence of the following documents prepared by Westinghouse Electric Corporation provided that the proprietary ones are treated as such: WCAP 7379L, Volumes 1 and 2 (Single-rod tests), WCAP 7495L, Volumes 1 and 2 (Multi-rod tests) and WCAP 7665 (Final FLECHT report) (See Tr. p. 3840). WCAP 7379L, Volume 2 and WCAP 7665 are non-proprietary documents; the others are proprietary. Applicant is willing to stipulate with CCPE that it need not furnish Applicant with copies of any of these documents pursuant to 10 CFR 2.743(f).

violation of the Clayton and Robinson-Patman Acts substantially upon the basis of officially noticing portions of the record in an earlier proceeding to which the petitioner had not been a party. To expand the doctrine of official notice to permit reliance upon material in the record of another proceeding under such circumstances would, in the Court's words, "do violence to fair play and due process." 362 F.2d. 180 at 185. United States v. Pink, 315 U.S. 203 (1942), on which CCPE puts particular reliance in its brief, is distinguishable in that the record which was officially noticed therein was of an earlier case to which the United States had also been a party and which contained issues and facts substantially identical to those in Pink. In the Indian Point proceeding, however, there is neither an identity of facts nor parties with those in the Vermont Yankee case.

VI

Although the official notice procedure is inappropriate here this is not to say that there have not been perfectly adequate means available to CCPE, throughout the course of these proceedings, to bring the contents of these documents to this Board's attention for consideration in connection with the Board's examination of the evidence in the case. In fact, counsel for CCPE and his assistant made extensive use of one of these alternate

procedures and based a considerable portion of their cross-examination during the hearings upon opinions, statements and data contained in these documents. Another technique utilized by counsel for CCPE has been to call the Board's attention to information contained in these documents and point out areas he felt deserved particular consideration by the Board.

Should the Board, upon reviewing either the cross-examination or the information in the documents themselves, conclude that there is a serious question as to the adequacy of Applicant's case, the Board may so indicate, just as it has raised questions in other areas, and all evidence and witnesses necessary for a full hearing and resolution of this particular question would be produced. In this way the interests which CCPE seeks to represent will be fully protected without any need for resort to the official notice technique.

Respectfully submitted,

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled "Applicant's Brief in Opposition to the Citizens Committee for the Protection of the Environment's Request that Official Notice Be Taken of Certain Documents" by mailing copies thereof first class and postage prepaid, to each of the following persons this 10th day of December, 1971:

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